

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JACKIE A. ZEHNER ROSS**

Claimant

VS.

**CHANUTE HEALTHCARE CENTER**

Respondent

AND

**ZURICH U. S.**

Insurance Carrier

Docket No. **1,014,678**

**ORDER**

Respondent and its insurance carrier request review of the July 13, 2007 Award by Administrative Law Judge Thomas Klein. The Board heard oral argument on October 19, 2007.

**APPEARANCES**

William L. Phalen of Pittsburg, Kansas, appeared for the claimant. Terry J. Torline of Wichita, Kansas, appeared for respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

The parties disputed whether claimant, as a result of her work-related injury, was entitled to compensation pursuant to K.S.A. 44-510e for a whole body injury or pursuant to K.S.A. 44-510d for a scheduled injury. The Administrative Law Judge (ALJ) determined claimant suffered a whole person permanent partial impairment and awarded claimant compensation for a 52.5 percent work disability based upon a 56 percent task loss and a 49 percent wage loss.

The respondent requests review of the following: (1) nature and extent of disability; (2) whether the respondent is entitled to a Social Security retirement offset; and, (3)

whether claimant should be assessed the duplicate deposition costs. Respondent argues claimant has only sustained a scheduled injury because no neck or cervical complaints were made throughout the two years that Drs. Frevert and Langford treated the claimant. Respondent further argues that respondent is entitled to a credit for the Social Security widow's benefits that claimant is receiving. Finally, respondent argues claimant should be assessed the costs for the claimant's expert witness depositions that were retaken.

Claimant argues the ALJ's Award should be affirmed.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant graduated from North Kansas City High School and then became certified as a nurse's aide at Allen County Community College in 1983. She began working as a certified nurse's aide (CNA) for Chanute Healthcare Center which is a nursing home. Claimant described April 8, 2003 accident as follows:

There was another aide with me. We were toileting a resident. We went to get him up off of the toilet, he started going down on us and we tried to hold him and I hurt my neck, my shoulder and my arm and this hand.<sup>1</sup>

Claimant reported the accident the same day to the charge nurse and director of nursing. The next day she sought medical treatment at Neosho Memorial Hospital. An MRI was performed on claimant's neck and shoulder. Claimant was then referred to Dr. Larry Frevert, an orthopedic physician. Dr. Frevert diagnosed claimant with a torn left rotator cuff and surgery was performed on June 10, 2003. Claimant's post-operative physical therapy on her shoulder was interrupted when she was hospitalized for triple bypass surgery.

After claimant recovered from her heart surgery she returned to physical therapy for her shoulder but continued to complain of left extremity numbness and tingling. An EMG was performed to determine whether the continued complaints were from the neck or the elbow. The EMG confirmed an ulnar nerve compression in the left elbow. Claimant was then referred to Dr. Scott Langford who performed surgery on claimant's left elbow on September 8, 2004.

Respondent placed claimant in an accommodated position working in the office. Her job duties included sorting, filing and running errands. Claimant worked approximately

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<sup>1</sup> R.H. Trans. at 14.

a year and then on May 18, 2005, was laid off by respondent due to low census at the facility.

Claimant sought employment and worked approximately two weeks for Iola Housing Authority as a janitor. Her job duties included mopping, sweeping, vacuuming, and cleaning. She was not able to continue this type of work due to the reaching, pushing and pulling. These activities increased the pain in her neck, shoulder, arm and back.

Claimant testified she is currently receiving \$846 a month in Social Security widow's benefits due to the death of her husband. Claimant testified she has pain in her neck, left shoulder, left elbow and left hand and numbness in her ring and little fingers. She further testified she did not have any problems with her neck, shoulder, elbow, hand or fingers on the left arm before the accident.

Claimant returned to work for the respondent March 2006. She is paid \$9.96 an hour, 20 hours a week working in the records department. Her job duties are filing medical records and cleaning the charts at the nurses' stations. These activities have increased the pain in her neck, arm and hand and caused some swelling in her arm. She continues to take pain medication.

Dr. Larry Frevert, board certified orthopedic surgeon, examined and evaluated the claimant on May 1, 2003, due to complaints of neck, left shoulder and arm pain. Dr. Frevert took a history from the claimant and diagnosed her with a torn rotator cuff. The doctor recommended a repair of the left rotator cuff. Claimant underwent an open left rotator cuff repair with acromioplasty on June 10, 2003. The last time Dr. Frevert saw the claimant was on May 25, 2005, and he determined that she was at maximum medical improvement. Then on August 2, 2005, Dr. Frevert rated claimant's loss of motion in the left shoulder at 18 percent based upon the *AMA Guides*<sup>2</sup>. The doctor placed restrictions on the claimant of no overhead activity, no lifting greater than 10 pounds, and no lifting of patients.

After a referral from Dr. Frevert, Dr. Scott Langford, board certified orthopedic surgeon, examined and evaluated claimant on June 28, 2004, due to complaints of numbness and tingling in the left small and ring fingers as well as pain in her left elbow. The doctor took a history from the claimant and diagnosed her with cubital tunnel syndrome of the left upper extremity. The doctor recommended physical therapy and prescribed pain medication. Claimant returned on July 30, 2004, for a follow-up visit and the doctor recommended surgery for her cubital tunnel syndrome. Dr. Langford testified that the claimant did not make any complaints of neck pain at the June 28, 2004 or July 30, 2004 visits. Dr. Langford performed a left cubital tunnel release with anterior transposition

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<sup>2</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

on September 8, 2004. A post-surgical office visit occurred on September 17, 2004, and physical therapy was prescribed. Claimant was restricted from lifting greater than five pounds. At the September 27, 2004 office visit claimant had continued complaints of arm pain and was advised to continue physical therapy.

A nerve conduction study was done on February 2, 2005, which revealed a normal study. As of February 11, 2005, Dr. Langford opined claimant had reached maximum medical improvement and no further restrictions were needed for the left elbow or hand. On July 25, 2005, Dr. Langford rated the claimant's left upper extremity at 5 percent based on the *AMA Guides*.

Dr. Edward J. Prostic, board certified orthopedic surgeon, examined and evaluated the claimant at her attorney's request. On October 27, 2004, Dr. Prostic took a history from claimant and performed a physical examination. The doctor opined the claimant's physical examination was consistent with the claimant's complaints of pain as well as the mechanism of her work-related injury. Dr. Prostic diagnosed the claimant with an excision of the lateral clavicle, subacromial decompression, left rotator cuff repair, left ulnar nerve transposition, and evidence of entrapment of the median and ulnar nerves at the left wrist as well as dysfunction of her neck and shoulder. The doctor recommended an EMG of her left arm with possible surgery and x-rays of her cervical spine.

On June 13, 2005, claimant was again examined and evaluated by Dr. Prostic due to complaints of numbness about her elbow, periodic dysfunction of her fingers, and an ache in her shoulder and neck. X-rays were taken of claimant's cervical spine which revealed disk space narrowing at C5-6. The left shoulder x-rays revealed evidence of subacromial decompression and excision of the lateral clavicle and significant demineralization of the tuberosities of the humerus. Dr. Prostic diagnosed claimant as having a chronic cervical sprain and strain, continued weakness of the left shoulder, weakness and loss of sensation of the left hand as well as surgery on her rotator cuff and elbow.

Dr. Prostic imposed restrictions against lifting weights greater than 20 pounds to shoulder height and minimal activities above shoulder height left handed. Claimant should avoid repetitious forceful gripping or use of vibrating equipment with her left hand. Based upon the *AMA Guides*, Dr. Prostic opined claimant has a 5 percent permanent partial impairment to the body as a whole for the cervical spine; 18 percent to the left upper extremity for excision of the lateral clavicle with persistent weakness; and 15 percent to the extremity for a significant weakness of grip and persistent numbness for an overall functional impairment of 23 percent to the body as a whole. Dr. Prostic further opined claimant had lost the ability to perform 18 of the 32 tasks on vocational expert Karen Terrill's corrected task list for a 56 percent task loss.

At claimant's attorney's request, Karen Crist Terrill, a qualified rehabilitation professional, performed a telephonic interview with the claimant on June 22, 2005. Ms.

Terrill opined claimant was capable of earning \$6 to 7.50 an hour based upon Dr. Frevert's restrictions. A second telephone interview occurred on March 13, 2006. Ms. Terrill again took claimant's 15-year work history before the date of accident. Ms. Terrill was then provided a Social Security earnings report which identified all of claimant's employers for the 15-year period before the accident. It was determined claimant performed 32 non-duplicative tasks in her 15-year work history before the accident.

Initially, it must be determined whether claimant suffered scheduled or non-scheduled injuries as a result of her work-related accident on April 8, 2003. The Act recognizes different classes of injuries and an injured employee may suffer a permanent disability to a scheduled body part or a permanent partial general disability.<sup>3</sup> It is the situs of the disability, not the situs of the trauma, that determines which benefits are available.<sup>4</sup> The Board, as a trier of fact, must decide which testimony is more accurate and/or more credible and must adjust the medical testimony along with the testimony of the claimant and any other testimony that might be relevant to the question of disability.<sup>5</sup>

Immediately after the incident at work claimant's complaints included neck pain and an MRI scan was performed of her cervical spine as well as her left shoulder. The cervical spine MRI revealed mild degenerative changes at C5-6 and the MRI of the left shoulder revealed a tear of the rotator cuff. Claimant was then provided treatment with Drs. Frevert and Langford. And other than her first office visit with Dr. Frevert, the claimant did not make any complaints of neck pain to the treating physicians nor did she request treatment for her neck.

After Dr. Frevert performed surgery on claimant's rotator cuff he was concerned that her ongoing complaints of numbness and tingling in her arm might be caused by a cervical condition. Dr. Frevert referred claimant for an EMG to determine if her ongoing problems were from a cervical lesion. The EMG confirmed an ulnar nerve compression in the left elbow. Both Drs. Frevert and Langford testified had claimant made cervical complaints they would have been documented and investigated. In summary, Drs. Frevert and Langford treated claimant over an approximate two-year time period and during that time claimant had not complained of neck pain other than her first visit with Dr. Frevert. Conversely, the claimant's medical expert, Dr. Prostig, opined claimant suffered chronic cervical sprain/strain and a 5 percent functional impairment for that condition.

The Board finds claimant's neck complaints were not adequately supported in the medical records and were insufficient to support a finding she suffered a permanent partial general body impairment. The Board further finds that in this case the injury was to the

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<sup>3</sup> K.S.A. 44-510d; K.S.A. 44-510e.

<sup>4</sup> *Bryant v. Excel Corp.*, 239 Kan. 688, 722 P.2d 579 (1986).

<sup>5</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

claimant's left shoulder and left elbow. Although claimant initially experienced neck pain diagnostic testing did not confirm that was the cause for her continuing complaints in her left extremity and she made no further complaints of neck problems to her treating physicians. In that respect, the Board finds the opinions of Drs. Frevert and Langford limiting claimant's permanent impairment to her left upper extremity more persuasive than Dr. Prostic.

Here, claimant sustained injuries to her left upper extremity. Thus, under the *Casco*<sup>6</sup> analysis, claimant is entitled to recovery based upon *two separate scheduled injuries*. *Casco* provided certain rules. They are as follows:

Scheduled injuries are the general rule and nonscheduled injuries are the exception. K.S.A. 44-510d calculates the award based on a schedule of disabilities. If an injury is on the schedule, the amount of compensation is to be in accordance with K.S.A. 44-510d.

When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof, the calculation of the claimant's compensation begins with a determination of whether the claimant has suffered a permanent total disability. K.S.A. 44-510c(a)(2) establishes a rebuttable presumption in favor of permanent total disability when the claimant experiences a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof. If the presumption is not rebutted, the claimant's compensation must be calculated as a permanent total disability in accordance with K.S.A. 44-510c.

When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, both legs, or any combination thereof and the presumption of permanent total disability is rebutted with evidence that the claimant is capable of engaging in some type of substantial and gainful employment, the claimant's award must be calculated as a permanent partial disability in accordance with the K.S.A. 44-510d.

K.S.A. 44-510e permanent partial general disability is the exception to utilizing 44-510d in calculating a claimant's award. K.S.A. 44-510e applies only when the claimant's injury is not included on the schedule of injuries.<sup>7</sup>

Now post-*Casco*, in any combination scheduled injuries are now the rule, while nonscheduled injuries are the exception.<sup>8</sup> When an employee's injury involves a combination of scheduled injuries, as here, there is a rebuttable presumption that the

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<sup>6</sup> *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494 (2007).

<sup>7</sup> *Id.*, Syl. ¶'s 7-10.

<sup>8</sup> *Id.*, Syl. ¶ 7; *Pruter v. Larned State Hospital*, 271 Kan. 865, 26 P.3d 666 (2001).

claimant is permanently and totally disabled. That presumption can be rebutted by evidence that the claimant is capable of engaging in some type of substantial gainful employment.<sup>9</sup>

In this case claimant is employed and although she is working part time there are no medical restrictions preventing her from full-time employment. Moreover, the vocational expert testified that claimant retained the ability to earn from \$6 to \$7.50 an hour. The Board finds the evidence establishes claimant is capable of engaging in some type of substantial gainful employment.

Casco provides that because the shoulder and elbow are each contained within the schedule of K.S.A. 44-510d(a), claimant's disabilities must each be compensated according to the schedule at the level that corresponds to that injury, regardless of whether the injuries occurred separately, simultaneously or as a result of a natural progression.

K.S.A. 44-510d(23) provides that loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

Based upon the *AMA Guides*, Drs. Frevert and Prostic opined claimant suffers an 18 percent functional impairment to the left shoulder. Thus, the Award is modified to reflect an 18 percent permanent partial functional impairment to the left upper extremity at the level of the shoulder.

Based upon the *AMA Guides*, Dr. Langford rated the claimant's left upper extremity at 5 percent. Dr. Langford explained his rating in the following fashion:

Q. Okay. And, doctor, could you tell me a little bit about how you came to the rating that you gave for Ms. Ross?

A. Well, the guides -- the Guides to Evaluation of Permanent Impairment Fourth Edition allots a mild ulnar nerve problem at the elbow at 10 percent of the upper extremity. And because her nerve conduction study showed that there was no -- no nerve problem, but because subjectively she still had some symptoms, I took half of that 10 percent and put it at 5 percent, as I felt that was a fair estimation.<sup>10</sup>

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<sup>9</sup> Casco, 283 Kan. 508, Syl. ¶ 9.

<sup>10</sup> Langford Depo. at 23.

Dr. Langford clearly provided a rating for the claimant's elbow. The Award is further modified to reflect claimant also suffered a 5 percent permanent partial functional impairment to the left upper extremity at the level of the arm.<sup>11</sup>

K.A.R. 51-7-8 provides that the number of weeks paid for temporary total disability are deducted from the number of weeks allowed for loss of use of the scheduled member before that number is multiplied by the percentage of disability. The parties stipulated that claimant received \$8,586.58 in temporary total disability compensation. Dividing that amount by the temporary total disability compensation rate results in 31.69 weeks. But the record neither indicates the dates such temporary total disability compensation was paid nor for which injured body part. Based upon this record, where claimant had two surgeries, it is reasonable to conclude she received separate periods of temporary total disability compensation following each surgery. Consequently, the 31.69 weeks of temporary total disability compensation will be divided equally and 15.84 weeks of temporary total disability will be deducted in the calculation of each separate scheduled disability award.

When respondent conducted cross-examination of Ms. Terrill, claimant's vocational expert, an allegation was raised that claimant had not worked for one of the listed employer's that the expert had included in developing the task list. Claimant's Social Security records were then obtained which detailed all of the employers claimant had worked for in the 15 years before her accident. The claimant's vocational expert then developed a new task list based upon the corrected information and her deposition was retaken. And Dr. Prostic's deposition was also retaken so that he could offer a task loss opinion based upon the corrected task list. When claimant deposed Ms. Terrill a second time it was ostensibly to counter the respondent's allegations concerning claimant's work history. And Dr. Prostic's deposition was retaken so that he could offer a task loss opinion based upon the vocational expert's corrected task list for the claimant. Under these particular circumstances, the Board finds that neither Dr. Prostic's nor Ms. Terrill's second deposition was duplicative and claimant did nothing wrong in deposing both a second time. The Board affirms the ALJ's assessment of the deposition costs to respondent and its insurance carrier.

Respondent and its insurance carrier request for a retirement benefit reduction under K.S.A. 44-501(h) should be denied. That statute provides:

If the employee is receiving retirement benefits under the federal social security act or retirement benefits from any other retirement system, program or plan which is provided by the employer against which the claim is being made, any compensation benefit payments which the employee is eligible to receive under the workers compensation act for such claim shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits, less any portion of any such

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<sup>11</sup> K.A.R. 51-7-8(c)(4) provides that an injury at the joint on a scheduled member shall be considered a loss to the next higher schedule.



retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee, **but in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment.** (Emphasis Added)

As claimant is receiving compensation benefits payable for functional impairment, the K.S.A. 44-501(h) reduction is inapplicable.

### AWARD

**WHEREFORE**, it is the decision of the Board that the Award of Administrative Law Judge Thomas Klein dated July 13, 2007, is modified to reflect claimant suffered an 18 percent functional impairment to the left upper extremity at the level of the shoulder and a 5 percent functional impairment to the left elbow at the level of the arm. The Award is affirmed in all other respects.

The claimant is entitled to 15.84 weeks of temporary total disability compensation at the rate of \$270.93 per week in the amount of \$4,291.53 followed by 37.65 weeks of permanent partial disability compensation, at the rate of \$270.93 per week, in the amount of \$10,200.51 for a 18 percent loss of use of the left shoulder, making a total award of \$14,492.04.

The claimant is entitled to 15.84 weeks of temporary total disability compensation at the rate of \$270.93 per week in the amount of \$4,291.53 followed by 9.71 weeks of permanent partial disability compensation, at the rate of \$270.93 per week, in the amount of \$2,630.73 for a 5 percent loss of use of the left elbow, making a total award of \$6,922.26.

The two separate scheduled injuries combine for a total of \$21,414.30 in temporary total and permanent partial disability compensation which is ordered paid in one lump sum less amounts previously paid.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of February 2008.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: William L. Phalen, Attorney for Claimant  
Terry J. Torline, Attorney for Respondent and its Insurance Carrier  
Thomas Klein, Administrative Law Judge